NO. 82-1673

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARVIN BRODIE, M.D., *et al.*,

Petitioners,

v.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

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BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

Counter-Statement of the Case

This case has come to this Court only after the petitioners have been rebuffed, twice in State court and twice in federal court, in their attack upon a rule of the New Jersey State Board of Medical Examiners, N.J.A.C. 13:35-

6.18, which requires physicians specializing in radiology to provide diagnostic radiological services to chiropractic physicians without discrimination on the basis of license classification.* Though the petitioners have mentioned in their petition for *certiorari* the adverse decisions of the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit, they have not mentioned that the Appellate Division of the Superior Court of New Jersey two years ago found the rule sustained by a legitimate regulatory purpose and that the Supreme Court of New Jersey subsequently refused further review. *Brodie* v. *N. J. Bd. of Medical Examiners*, 177 N. J. Super. 523 (App. Div. 1981), certif. den. 87 N. J. 386 (1981). For little wonder did both federal courts thereafter find the Board rule entirely appropriate under all pertinent constitutional standards. The petitioners' contentions are no less spurious now, and consequently this Court should deny their application for *certiorari*.

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* In pertinent part N.J.A.C. 13:35-6.18 provides:

> (b) A physician possessing a plenary license to practice medicine and surgery who provides diagnostic radiological services for other physicians possessing a plenary license to practice medicine and surgery shall, upon the request of a chiropractic physician, provide diagnostic radiological services to such chiropractic physician without discrimination on the basis of classification of license, provided the diagnostic radiological services rendered pertain to skeletal areas of a body.
>
> (c) Denial of professional diagnostic radiological services, as set forth herein, shall constitute purposeful and intentional discrimination and may subject the licensee to appropriate disciplinary action by the Board of Medical Examiners.

The Board determined to promulgate the rule after receiving 49 complaints from chiropractors and their patients stating that the patients had been denied examination by radiologists solely because they had been referred by chiropractors. As examples, the patient of one chiropractic physician who suspected atelectasis—incomplete lung expansion—was kept waiting while suffering a pneumothorax for over a half hour because the radiological group flatly refused to take x-rays, while another chiropractic patient in a great deal of pain referred for x-rays based upon a history of spinal fusion was similarly refused.

As other examples, in a number of cases Medicaid or Medicare patients were refused radiological services. In one case the chiropractor made a total of five unsuccessful attempts to have x-rays taken in different hospitals, and in another a Medicaid patient had to travel from Long Branch to Asbury Park to obtain x-rays after the local radiological group had refused to accept the chiropractor's referral. Often Medicaid payment for x-rays requested by a chiropractor could be had only through the circuitous route of obtaining an added referral by a plenary physician at public expense. This matter was therefore of considerable concern to the State Division of Medical Assistance and Health Services, which complained to the Board on three separate occasions.

Although the Board initially took the position in 1976 that it would not require radiologists to accept chiropractic referrals, the problem was of such dimension that the agency reconsidered the matter and, after an appearance before it by petitioner Marvin Brodie, proposed the rule on June 5, 1980. In response to the opportunity to submit comments contained in its notice the Board received 276 letters from patients and 14 letters from chiropractors favoring the rule. Only 11 letters and telegrams opposed

it, and only four contained anything more than conclusory statements of opposition. Those four letters, from the Radiological Society of New Jersey, the Medical Society of New Jersey, the American College of Radiology and the Morristown Radiology Associates, objected that the rule exceeded the legal authority of the Board and asserted that because chiropractic was based upon a different philosophy of treatment the chiropractic patient would somehow be better served by being altogether denied the expert services of the radiologist. No examples or even hypothetical situations in which this outcome would be apparent were furnished. Deciding, therefore, that the comments received did not warrant public hearing, the Board adopted the rule on August 5, 1980.

Later that month Marvin Brodie and others filed a notice of appeal with the Appellate Division of the Superior Court of New Jersey, seeking injunctive relief from that court. Upon being denied that relief they then filed a complaint with the United States District Court, but that court too denied a preliminary injunction while abstaining in order that issues of State law might be decided in the State appeal. On February 27, 1981 the Appellate Division unanimously affirmed the challenged rule. *Brodie* v. *N. J. Bd. of Medical Examiners, supra.* Holding that the Board possessed the statutory authority to adopt the regulation, 177 N. J. Super. at 530, the Appellate Division quoted at length a March 28, 1980 letter from Dr. Edwin H. Albano, President of the Board of Medical Examiners, to counsel for petitioner Brodie:

> [I]t is clear that a responsible chiropractor may need expert radiology services to determine whether chiropractic adjustment is appropriate and/or safe for a given patient and it is an exercise of responsible judgment for that chiropractor or for a podia-

> trist to request such expert radiological procedures before proceeding with independent patient management. Where [radiologists] have made their services available to all other competent physicians but have selectively discriminated against chiropractors and podiatrists as an entire class of limited licensees, such conduct is found by the Board not to be in the best interest of the people of this State.

So stating the rationale for the rule, the court found no merit in the petitioners' contentions that it interfered with their right to exercise an independent professional judgment or abridged any other rights. *Id.* at 526. On June 3, 1981 the Supreme Court of New Jersey denied the petitioners' petition for certification.

The State litigation thus having been concluded, the petitioners in August 1981 filed with the District Court notices of motion to reopen the federal proceedings and to take discovery from the Board members, seeking to have the Board members, for example, "[i]dentify each and every document referred to, examined, studied, read, discussed or which in any manner was connected with the Board's determination that the regulation should be adopted." With the Attorney General on behalf of the Board moving for summary judgment, the District Judge, Honorable H. Curtis Meanor, on February 22, 1982 detailed at length his reasons for affirming the validity of the rule. After noting that the regulation had been affirmed by the Appellate Division and that the Supreme Court of New Jersey had denied further review (PaB-2) and after pointing out as well that no First Amendment nor other fundamental right was implicated (PaB-5, 6), the judge recognized that the appropriate standard of constitutional review was to identify a rational basis for the rule and said:

> We had pointed out in oral argument that in some circumstances physical conditions may exist that would render the utilization of chiropractic adjustments inadvisable and unsafe for a patient. I don't have exhaustive medical imagination, but in discussions with Counsel we had the example of a patient who has posterior broken ribs . . .,
>
> If broken ribs appear, I would rather doubt that manipulating those broken ribs and letting them fly loose would be appropriate under the practice of chiropractic. They could puncture a lung and cause serious difficulty. [PaB-8]

Saying that the same conclusion would be drawn regarding a possible herniated disc, Judge Meanor indicated that such example would "serve to illustrate the type of information that this regulation is trying to get to the chiropractor so the chiropractor can make his own judgment as to whether the practice of his branch of the healing is safe and proper under the circumstances" (PaB-8). As he stated, "[I]t seems to me that this regulation has a legitimate and rational goal" (PaB-9).

In affirming this judgment the United States Court of Appeals pointed out that, under well-established principle, social and economic regulation does not offend the due process clause if the regulation is rationally related to a legitimate state purpose and that in this case "there is no dispute that the New Jersey Board of Medical Examiners had a legitimate purpose for promulgating the regulation in question"—that of "insur[ing] that chiropractors have access to information indicating whether a patient's physical condition makes chiropractic treatment unwise or even dangerous" (PaA-5). To survive the motion for summary judgment, the petitioners would have had to allege some set

of facts which, taken as true, would suggest the absence of a rational basis. The petitioners had not done so, for, even assuming that radiologists would not be able to practice in the manner in which they are accustomed, "[n]othing in [their] affidavits undercuts the presumption that the regulation will further the state's interest in providing better and safer medical care for the patients of chiropractors" (PaA-5, 6).

With respect to the First Amendment claim, the Court of Appeals observed that the petitioners had presented an affidavit indicating that at least one radiologist intended to communicate his disapproval of the chiropractic discipline by refusing to accept referrals from chiropractors (PaA-6, 7), but the court pointed out as well the proposition that a limitless variety of conduct cannot be labeled "speech" whenever the person engaging in the conduct intends to express an idea (PaA-7). Here the proposed conduct simply was not speech, for "there is nothing in the record that suggests any likelihood that the actions of the radiologists would be understood to communicate the intended disapproval" (PaA-8). In any event, a government regulation is justified if it is constitutionally authorized, if it promotes a substantial governmental interest, if that interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to furthering that interest (PaA-8). The court concluded:

> [W]e are convinced that [the petitioners] could advance no evidence sufficient to warrant the invalidation of the regulation. There is no question that the Board is empowered to promulgate the regulation and that the regulation furthers the important governmental interest in safe health care—an interest

> that is totally unrelated to the suppression of free expression. And, although we find it difficult to believe that this regulation will have any impact whatsoever on the right of radiologists to express their individual or collective opinion of chiropractic, any such impact will certainly be de minimis. [PaA-8]

Radiologists remained free, moreover, to recommend that patients consult with medical doctors, to express their views, orally or in writing, regarding any supposed evils of chiropractic and to lobby the Board, the State Legislature or the Governor to modify or repeal the rule (PaA-8, 9). In the words of the Court of Appeals, "[I]t would offend reason to hold that this regulation is prohibited by the first amendment" (PaA-9).

A pair of State courts and a pair of federal courts have thus determined that the petitioners' challenge to the Board of Medical Examiners regulation is unfounded. All of those courts concur that the rule is a legitimate exercise of State authority to protect the public welfare. Manifestly the case offers no justification whatever for review by this Court, and therefore the Attorney General on behalf of the Board opposes the petition for *certiorari*.

ARGUMENT

POINT I

As the Court of Appeals found, the Board of Medical Examiners rule forbidding radiologists from discriminating against referrals from chiropractors does not violate the Fourteenth Amendment in that it is supported by the rational basis of assuring the availability of expert radiological services to all patients needing it, and therefore *certiorari* should be denied.

The insubstantiality of the petitioners' contentions may best be judged by the notable lack of enthusiam with which they have been greeted by the four courts that have already heard them. Despite the petitioners' insistence upon attacking the Board of Medical Examiners rule in forum after forum in both the State and the federal domain, the regulation is, self-evidently, nothing more than an entirely conventional regulatory measure which is designed to prohibit discrimination by one class of health care providers against the patients of another and which is grounded upon the indisputable authority of the State, here delegated to an administrative agency, to protect the public health and welfare. Two years ago the New Jersey courts concluded both that the Board of Medical Examiners possessed the legislative power to promulgate the rule and that it had done so upon a plainly legitimate public purpose, infringing upon no constitutional prerogative, while the United States District Court and the United States Court of Appeals have now concluded, similarly, that a rational basis for the regulation exists and that no constitutional right has been violated. As in the other tribunals, the petitioners have presented to this Court not the slighest warrant for the granting of *certiorari*, and therefore their petition in that regard should be denied.

The standard which this Court has articulated for the evaluation of allegations that State legislation violates the Fourteenth Amendment is well-established and need be only briefly repeated. State regulations will not be invalidated as violating due process "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1954). Rather, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." From the equal protection standpoint, furthermore, "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). The question is not whether the provision will actually further a rational goal, but only whether a theoretical relationship exists between provision and purpose. *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U.S. 456, 463-464, 101 S. Ct. 715, 66 L.Ed. 2d 659 (1981).*

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* This Court has departed from this deferential attitude only with respect to the narrowest categories of classification. Strict scrutiny will be applied "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed. 2d 520 (1976), with fundamental rights including matters such as voting interstate travel and uniquely private activities, 427 U.S. at 312, n. 3, and suspect classes including only race, ancestry and alienage. *Id.,* n. 4. Only then is a court to demand a com-

(Footnote continued on following page)

These principles unquestionably apply to this Board of Medical Examiners rule. Far from constituting "misapplied broad dicta" (Pb10), they constitute the essence of due process/equal protection adjudication, affording the appropriate reconciliation of the relationship between individuals and their government, and they unerringly demonstrate the validity of this regulation. Both on its face and in light of the background material drawn up by the Appellate Division, the rule clearly has an underlying reasonable basis, for it is an anti-discrimination provision, requiring a radiologist to "provide diagnostic radiological services to [a] chiropractic physician without discrimination on the basis of classification of license," N.J.A.C. 13:35-6.18, and in no way distinguishable from the varous federal and State statutes forbidding discrimination on the basis of circumstances legislatively deemed irrelevant. *See e.g. Civil Rights Act of 1964,* 42 U.S.C.A. §1981 *et seq.; New Jersey Law Against Discrimination,* N.J.S.A. 10:5-1 *et seq.* The provision is, then, an entirely reasonable and appropriate regulatory measure designed to assure the availability of radiological services to all in need of them.

However much the language of the rule may speak for itself regarding its rational regulatory purpose, further illumination has been provided by the Appellate Division. That court quoted in its entirety a March 28, 1980 letter from Dr. Edwin H. Albano, President of the Board of

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(Footnote continued from preceding page)

pelling reason for a classification, and a "fair and substantial relationship" with a legitimate State end is demanded only regarding a gender-based classification. *Craig* v. *Boren;* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976). The pursuit of a medical practice does not involve a fundamental right. *Woods* v. *Holy Cross Hospital,* 591 F.2d 1164, 1173 n. 16 (5th Cir. 1979).

Medical Exminers, to counsel for Marvin Brodie, a plaintiff in the State litigation, *Brodie* v. *N. J. Board of Medical Examiners, supra,* 177 N. J. Super. at 527-528, and a petitioner in this Court. Observing that "a responsible chiropractor may need expert radiology services to determine whether chiropractic adjustment is appropriate and/or safe for a given patient" and that it is "an exercise of responsible judgment for that chiropractor . . . to request such expert radiological procedures before proceeding with independent patient management," Dr. Albano stated the Board finding that such selective discrimination is "not . . . in the best interest of the people of this State." *Id.* at 528. No more definitive statement of a rational purpose for a legislative provision can be imagined, and it is thus not surprising that both the District Court and the Court of Appeals thereafter swiftly concurred by rejecting the petitioners' claim.

Only brief response is needed concerning the petitioners' other contentions. They hypothesize that the Court of Appeals has somehow "confus[ed]" the standards pertaining to due process and equal protection challenges (Pb12), yet that court made no such error. As the Ninth Circuit has observed:

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. [*Beller* v. *Middendorf,* 632 F. 2d 788, 808 (9th Cir. 1980),

cert. den. sub nom. *Beller* v. *Lehman,* 452 U.S. 905, 101 S. Ct. 3030, 69 L.Ed. 2d 405 (1981)]

It is only when the government seriously intrudes into matters lying at the core of interests deserving due process protection that strict scrutiny will be utilized. *Ibid. See Williams* v. *Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed. 2d 586 (1970) (Harlan, J., concurring). Here, as noted, the "interest" which these petitioners assert is in no respect connected with any fundamental right and is therefore subject to any reasonable governmental control.

This most minimal of review standards most assuredly does not authorize the sort of plenary trial which the petitioners have always desired in this case. Such procedure would be blatantly contradictory of the rational basis test, given that proofs are to be allowed only when the existence of a rational purpose for the legislation is genuinely in doubt; when, as here, there is no doubt whatever in this regard, judgment validating the enactment must be granted without more. *Minnesota* v. *Clover Leaf Creamery Co., supra; United States* v. *Carolene Products Co.,* 304 U.S. 144, 153-154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). It would be contradictory as well of the proposition that an administrative agency head may not be subjected to intensive inquiry concerning the reasoning underlying a particular decision whose rationale is evident from its language and circumstantial context. *United States* v. *Morgan,* 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). Finally, it would ignore the fact that under the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.,* agency rulemaking of a non-emergent character may proceed only after all interested persons are afforded the reasonable opportunity for submitting comments, N.J.S.A. 52:14B-4(a), an opportunity which

was provided here. Consequently, however much the petitioners may wish to conduct an inquisition of the members of the Board of Medical Examiners, both before and during trial, the District Court and the Court of Appeals correctly concluded that their demand was wholly improper.*

The agency regulation at issue in this case is indistinguishable from the vast number of rules promulgated by a multitude of administrative agencies in every state across

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* The petitioners cannot escape this conclusion by seeking to erect a distinction between a legislative requirement adopted by the Legislature itself and a requirement adopted by one of the Legislature's designated administrative agencies. As this Court has said:

> It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. [*King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 103, 58 S.Ct. 489, 72 L.Ed. 801 (1928)].

For purposes of federal judicial review, the concept "statute" includes "every act legislative in character to which the State gives sanction, no distinction being made between acts of the State Legislature and other exertions of the state law-making power." *Hamilton* v. *University of California*, 293 U.S. 245, 258, 55 S.Ct. 197, 79 L.Ed. 343 (1934).

Again, however, the overriding point is that the Board of Medical Examiners rule is a self-evidently rational and legitimate provision designed to protect the public welfare. As four courts have already found, its very language, not to mention the background information provided by the letter of Board President Albano, demonstrates its purpose of making available radiological services to patients who previously had been denied access to them. No factual probing through discovery or trial could possibly undercut this rational basis.

the nation. All of them are designed, in one way or other, to promote the public good. All of them cause discomfort to some private interest. None of them is invalid on that account. Having had their due in both State and federal court, the petitioners have shown not the slightest justification for further consideration by this Court, and therefore their petition for *certiorari* should be denied.

POINT II

The Court of Appeals properly found both that "symbolic speech," and therefore the First Amendment, are not involved because the petitioners, upon receiving referrals from chiropractors, intended to do, literally, nothing, and that, in any event, the State and its agency are empowered to regulate activity which is conduct, and therefore *certiorari* should be denied.

If one were to entertain even the possibility of the petitioners having set forth a cognizable cause of action, the thought would be immediately dispelled by their singular proposal that non-compliance with the Board of Medical Examiners rule forbidding discrimination against chiropractic referrals constitutes "symbolic speech" which must be shielded by the full panoply of First Amendment protections.* Notwithstanding that the regulation is in all respects an entirely rational means of assuring the availability of radiological services and notwithstanding that a federal court is not to interfere with the operation of such

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* Although the petitioners have mentioned their First Amendment argument in this Court as well as in the Court of Appeals and the District Court, it may be pointed out that both their original complaint and their amended complaint are bereft of any such allegation.

a reasonably-based legislative measure, see Point I, *supra*, the petitioners argue in essence that any and all individuals subject to any sort of governmental regulation in the public interest may avoid the regulatory requirements through the verbal sleight of hand of sticking a First Amendment label upon their refusal to conform to the law. Any physician not comprehending the wisdom of Food & Drug Administration limitations on the use of unauthorized drugs may dispense the substances, or at least have a federal court scrutinize closely the focus of the federal agency rulemaking, because doing so constitutes his way of "symbolically" expressing his own perception of proper medical practice. Any owner of a public accommodation operating in interstate commerce may circumvent the statutory prohibition of racial discrimination because his exclusion of particular persons is his "symbolic" way of expressing dissatisfaction with prevailing social values. The proposition is absurd.

This Court has long recognized the obvious and necessary distinction between speech, which is protected by the First Amendment, and conduct, which is not. As this Court has said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968). Consequently, in every instance in which the contention is pressed the critical threshold question must be confronted —"whether [the litigant's] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Spence* v. *Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed 2d 842 (1974). As one federal court has observed, in order for conduct to be a surrogate of speech it must have characteristics which readily identify it as such:

> First, the conduct should be assertive in nature. This will generally mean that the conduct is a departure from the actor's normal activity and cannot adequately be explained unless a desire to communicate is presumed. Second, the actor must have reason to expect that his audience will recognize his conduct as communication. . . . [*United States ex rel. Radich* v. *Criminal Court of New York*, 385 F.Supp. 165, 173 n. 33 (S.D.N.Y. 1974)]

The *Radich* court quoted "Symbolic Conduct," 68 *Colum. L. Rev.* 1091, 1117 (1968), and other commentators have also pointed out the wholly conventional proposition involved. "Symbolic Speech and Compelled Expression: Wooley v. Maynard," 1977 *Utah L. Rev.* 797, 799 (1977); Nimmer, "The Meaning of Symbolic Speech Under the First Amendment," 21 *U.C.L.A. L. Rev.* 29, 36 (1973).

Plainly, the conduct in which these petitioners intend to engage is not speech, symbolic or otherwise. As the Court of Appeals found, "[T]here is nothing in the record that suggests any likelihood that the actions of the radiologists would be understood to communicate the intended disapproval" (PaA-8). They do not intend to affix a peace symbol to an American flag hanging outside an apartment window shortly after a military invasion, *Spence* v. *Washington, supra,* and they do not intend to wear black arm bands, an extraordinary mode of dress obviously designed to be protest. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969). Instead, they propose to do, literally, nothing, for they will simply not accept referrals from chiropractors supposedly to express their belief that the radiological and medical professions and the government should not condone or support chiropractic. They have no "reason to expect that [their] audience will recognize [their] con-

duct as communication." *United States ex rel. Radich* v. *Criminal Court of New York, supra.* Those not participating in this non-transaction, if noticing at all, will merely shrug; those turned away will be justifiably annoyed and angry. The public policy favoring freedom of expression will not be advanced even slightly.

The First Amendment is not to be used to erase all government power to regulate in the interest of the public health, safety and welfare. Even if "speech" be assumed to be somehow involved in a particular case, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978), quoting *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). It is one matter, certainly, if the governmental regulation is directed against speech as such, but it is quite another matter when the legislative measure is focused upon activities legitimately considered contrary to the public good. As this Court said in the *Giboney* case concerning an injunction against labor picketing, "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." 336 U.S. at 498.*

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* Although cited by the petitioners (Pb17), *NAACP* v. *Claiborne Hardware Co.,* —— U.S. ——, 103 S.Ct. 3409, 73 L.Ed. 2d 1215 (1982), hardly supports their contention. There this Court, while concluding that liability could not be imposed upon participants in a generally non-violent and politically motivated

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Both the District Court and the Court of Appeals understood that whenever a litigant asserts a supposed right of free expression in defense to some governmental restraint upon his conduct, the reviewing court must consider the claim upon a number of criteria. It must first evaluate the contention upon the recognition that most human conduct does not constitute "symbolic speech," but is conduct pure and simple and may be controlled under the police power. The court must recognize further that, even assuming free expression to be somehow involved, the boundaries of the right to express oneself freely are delineated by the rights of others not to be intruded upon and, of particular importance to the present case, to enjoy the benefits afforded them by legitimate governmental regulation. *See generally,* Fuchs, "Further Steps Toward a General Theory of Freedom of Expression," 18 *Wm. & Mary L. Rev.* 347, 375-377 (1976).

The Board of Medical Examiners rule in question here plainly is an example of such legitimate governmental regulation. It deals solely with conduct—the petitioners' refusal to offer their services to patients who have sinned

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boycott, recognized nonetheless "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." 73 L.Ed. 2d at 1235. Unlike earlier cases in which the First Amendment had not protected concerted efforts to control the marketplace, the *Claiborne Hardware* petitioners had been seeking to vindicate rights secured by the Fourteenth Amendment, "not to destroy legitimate competition" in the face of government attempts to preserve it. The decision thus restricts not at all the legitimate power of government to enact a provision such as the Board of Medical Examiners rule, whose purpose obviously is not the suppression of speech, but the furtherance of the public health and welfare.

only by being referred by a chiropractor. The petitioners and all other radiologists remain free to expound at length to all who will listen concerning their dissatisfaction with the provision in particular and with chiropractic licensing in general. Indeed, they are at liberty to persuade as many as possible that the regulatory system should be dismantled. The issue is not that of requiring "alternative means of expression" (Pb17), for the petitioners' refusal to accept chiropractic referrals is not expressive at all and is, in any event, obviously open to government control. The issue is only whether the petitioners may impose upon the public through their conduct their own personal views rather than the quasi-legislative judgment of the Board of Medical Examiners and thereby deny the statutorily-guaranteed right to chiropractic treatment. With the Court of Appeals as well as the District Court having resolved that question against them, the petitioners have shown no justification for review by *certiorari*. Their petition in that regard should be denied.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Respectfully submitted,

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Dated: May 10, 1983

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